Supreme Court, U.S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1332

TANKER HYGRADE NO. 18, INC.,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent,

—against—

MOTOR TUG CRUSADER, INC., a corporation,
CLAYTON P. KEHOE TOWING COMPANY, INC., a corporation,
MARTIN J. KEHOE TOWING COMPANY, INC., a corporation,
and
TANKER HYGRADE NO. 24, INC., a corporation,
Third-Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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MOTOR TUG CRUSADER, INC., a corporation,
CLAYTON P. KEHOE TOWING COMPANY, INC., a corporation,
MARTIN J. KEHOE TOWING COMPANY, INC., a corporation,
and
TANKER HYGRADE NO. 24, INC., a corporation,

Third-Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Tanker Hygrade No. 18 Inc., prays that a writ of certiorari issue to review the final judgment of the United

States Court of Claims, entered on December 17, 1975, granting respondent's motion for summary judgment and dismissing petitioner's petition, pursuant to 33 USC §1161 (i) (1) (1970),* seeking to recover the cost of removing an oil spill from petitioner's barge HYGRADE No. 18, which occurred when the barge was brought into contact with a rock formation at the bank of the New York State Barge Canal.

Citation to Opinion Below

The opinion of the United States Court of Claims printed in the appendix herein (infra pp. 1a-18a), is reported at 526 F 2d 805 (1975).

Jurisdiction

The judgment of the United States Court of Claims was entered on December 17, 1975.

The jurisdiction of this Court is invoked under 28 USC §1255(1).

Statutory Provisions Involved

This Petition involves the following statutory provisions which are printed in the appendix.

1. 33 USC §1161(f)(1) (1970) (Appendix infra p. 19a)

2. 33 USC §1161(g) (1970) (Appendix infra pp. 20a-21a)

3. 33 USC §1161(i) (1) (1970) (Appendix infra p. 21a)

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* By amendment, reorganization and expansion, this section is now classified to 33 USC 1321 (i) (1) (1972).

Questions Presented

1. Whether a determination by the Court of Claims that a finding with respect to piercing the corporate veil in one case cannot be litigated again in an unrelated case, is in conflict with applicable decisions of this Court.

2. Whether a determination by the Court of Claims that petitioner is collaterally estopped from litigating matters which had been referred to in an unrelated case, is in conflict with applicable decisions of this Court.

Statement of the Case

Petitioner is the owner of a loaded non-self propelled oil barge, HYGRADE No. 18, which was in tow of the tug, JOAN KEHOE, owned by third-party defendant, Clayton P. Kehoe Towing Company, Inc., when she was caused to come in contact with a rock formation at the bank of the New York State Barge Canal while attempting to squeeze by the approaching barge, BLUE LINE NO. 107, owned by third-party defendant, Tanker Hygrade No. 24, Inc., in tow of the tug SENECA, owned by third-party defendant, Motor Tug Crusader, Inc. As a result of the contact, the barge, HYGRADE No. 18, spilled a considerable amount of fuel oil into the New York State Barge Canal and the Vermont waters of Lake Champlain. Petitioner elected to remove the oil from the water and expended the sum of $152,500.00 to accomplish this task. Thereafter, petitioner invoked 33 USC §1161(i)(1) (1970) which encourages the owner of a vessel, from which oil is discharged, to remove such oil and then allows him to recover the reasonable costs incurred in such removal upon establishing in a suit which may be brought against the United States Government in the United States Court of Claims that such discharge was caused solely by an act or omis-

sion of a third party without regard to whether such act or omission was or was not negligent.

Petitioner instituted such a suit against respondent, United States of America, in the United States Court of Claims whereupon respondent impleaded the owners of the tug JOAN KEHOE, the tug CRUSADER, and the barge HYGRADE No. 24 alleging, in effect, that if the oil spill was in fact caused by an act or omission of a third party, such third party was the owner of either of said vessels who must indemnify respondent for the amount of any judgment respondent is called upon to pay petitioner.

After the pleadings were filed, the petitioner filed a pre-trial submission which was amended to allege that the oil spill was caused by the act or omission of third parties, Clayton P. Kehoe Towing Company, Inc., owner of the tug JOAN KEHOE, or Motor Tug Crusader Inc., owner of the tug SENECA. Respondent then filed a motion for summary judgment alleging in effect that the decision of the United States District Court, District of Vermont, in the case of *United States* v. *Ira S. Bushey & Sons Inc.*, 363 F. Supp. 110 (DC Vt. 1973), affirmed without opinion in 487 F. 2d. 1393 (CA2 1973) cert. denied 417 U.S. 976 (1974) (hereinafter referred to as *the Vermont case*) already decided that the tug SENECA, and not the tug JOAN KEHOE, caused the oil spill. Furthermore, since the tug SENECA is owned by third-party defendant, Motor Tug Crusader Inc., a corporation, like petitioner, wholly owned by Ira S. Bushey & Sons, Inc., respondent contends that Motor Tug Crusader Inc. is not a third party as to petitioner so that petitioner cannot recover under 33 USC §1161(i)(1) (1970).

Petitioner opposed the motion for summary judgment on the grounds that *the Vermont case* rendered its decision affording injunctive relief to the Government because of nine separate and distinct incidents, only one of

which related to the subject case. Petitioner contended that the findings in *the Vermont case* with respect to the subject accident were not necessary and essential to its judgment which granted injunctive relief. The findings in *the Vermont case* taken as a whole, led to the decision to issue an injunction but a finding as to each incident by itself was not necessary and essential to the decision to grant injunctive relief. The injunction would have been granted despite the circumstances surrounding the subject oil spill and, in any event, the defendant in *the Vermont case* did not litigate the circumstances of each oil spill because it contended at the trial that regardless of the circumstances surrounding the subject oil spill, the Government was not entitled to injunctive relief but only to relief afforded by the applicable statutes. The Court of Claims rejected petitioner's contention and decided that all of the nine incidents referred to in *the Vermont case,* were material although not essential to the decision granting injunctive relief.

The Court of Claims also held that *the Vermont case* litigated the question of the relationship amongst the various corporations wholly owned by the defendant, Ira S. Bushey & Sons, Inc., and decided that all of these subsidiary corporations had an alter-ego relationship to Ira S. Bushey & Sons Inc., from which the Court of Claims erroneously decided that petitioner cannot relitigate what it referred to as the "piercing-corporate-veil finding". Consequently, the Court of Claims has ruled, in effect, that once a Court has pierced the corporate veil, the corporation is precluded thereafter from ever raising the point again in another case, unrelated to the case in which the decision with respect to piercing the corporate veil was rendered.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

POINT I

The Court of Claims erred in disregarding petitioner's corporate existence.

The Vermont case decided that it was necessary to pierce the corporate veil in order to make its injunctive relief effective because such relief could easily be circumvented by the parent corporation simply by using other subsidiary corporations to make the petroleum deliveries to Vermont. Consequently, *the Vermont case* concluded that the public interest in preserving the environmental integrity of Lake Champlain, the sixth largest lake in the country and a jewel of nature, was sufficiently paramount that the parent corporation, Bushey, which profits from the operations of its alter-ego subsidiaries, should be accountable for any violation or continuing threat of violations to that integrity (District Court Opinion, Page 119). No such compelling reason or reasons exist in the case at bar to pierce the corporate veil and it is noteworthy that the Court of Claims did not find or hold that any such reason did exist. It merely stated that petitioner is collaterally estopped by the decision in *the Vermont case*.

Petitioner submits that such a finding is in clear and direct conflict with the decisions of this Court and of the Court of Appeals for the Second Circuit. In *Bangor Punta Operations* v. *Bangor & A.R. Co.*, 417 US 703, 713, 41 L. Ed. 2d 418, 94 S Ct 2578, this court stated as follows:

> "Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy."

In *Taylor* v. *Standard Gas & E. Co.*, 306 US 307, 322, 83 L. Ed. 669, this Court stated as follows:

> ". . . the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice."

Whereas the Court of Claims erroneously concludes that once the corporate veil has been pierced in a case, it must be considered forever pierced regardless of the nature of the subsequent litigation, this Court holds that the separate identity of a corporation must be respected for most purposes and whether or not the corporate veil will be pierced depends upon the facts of the case under consideration. In *Bowater Steamship Company* v. *Patterson*, 303 F. 2d 369 (CA2 1962), cert. denied 371 US 860, 9 L. Ed. 2d 98, 83 S Ct 116, the Court stated as follows at page 372:

> "Assuming, as we may, that plaintiff and Bowater's Newfoundland had sufficient independence to be regarded, in contract or tort litigation, as separate both from the ultimate parent, Bowater Paper Company, Ltd., and from each other, see *Bartle* v. *Home Owners Cooperative, Inc.*, 309 N.Y. 103, 127, N.E. 2d 832 (1955) it does not follow that they ought be so regarded for application of the Norris-La Guardia Act. Whether a subsidiary corporation is to be considered a separate entity 'cannot be asked or answered in vacuo,' Latty, The Corporate Entity, as a Solvent of Legal Problems, 34 Mich L. Rev. 597, 603 (1936); the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law."

Clearly, therefore, the Court of Claims was in error and in conflict with established law in holding that collateral estoppel prevents the petitioner from allegedly relitigating the so-called "piercing-corporate-veil finding".

There is nothing inherently wrong with forming a corporation in order to limit one's personal liability nor is there anything inherently wrong with forming two affiliated corporations wholly owned by a parent corporation. These affiliated corporations are entitled to their separate identities unless some fraud or injustice results from an attempt to keep their identities separate. In *Zubik* v. *Zubik,* 384 F. 2d 267, 273 (CA3, 1967) cert. denied 390 US 988, 19 L. Ed. 2d 1291, 88 S Ct 1183, the Court said as follows:

> "Limiting one's personal liability is a traditional reason for a corporation. Unless done deliberately with specific intent to escape liability for a specific tort or class of torts, the cause of justice does not require disregarding the corporate entity."

Congress itself, in enacting 33 USC §1161(f)(1), imposed a limit on the liability of a vessel owner from whose vessel, oil is discharged, in the amount of $100.00 per gross ton of the offending vessel,* which amount, in many cases, would be considerably less than the assets of the corporation.

Rather than try to evade responsibility or perpetrate a fraud or injustice, petitioner voluntarily chose to remove the oil and then sue the United States Government to recover the cost in the Court of Claims pursuant to 33 USC §1161 (i)(1). Congress clearly intended to encourage the removal of oil spills by permitting a vessel owner who

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* Unless there is willful negligence or willful misconduct within the privity and knowledge of the owner.

did so to recover from the United States under certain conditions including the act or omission of a third party without regard to whether such act or omission was or was not negligent. The decision of the Court of Claims thwarts the letter and spirit of 33 USC(i)(1) by refusing to allow petitioner to offer proof toward showing that the oil spill did not occur by reason of any act or omission on its part but occurred by reason of an act or omission by a third party, either the tug JOAN KEHOE which was towing the barge HYGRADE No. 18 at the time of the oil spill, or the tug SENECA, which was towing the barge BLUE LINE No. 107 towards the HYGRADE No. 18 at the time to the oil spill.

Since the intent of the statute is to place the expense of removal on the vessel whose act or omission caused the oil spill with a limitation of liability to $100.00 per gross ton* (33 USC §1161(g), the injustice in this case does not stem from affording two affiliated corporations (the owners of the barge, HYGRADE No. 18, and the tug, SENECA) their right to separate identities but stems from the failure of the Court of Claims to apply the statute whose obvious intent is to limit the liability to $100.00 per gross ton. In this connection, it should be noted that a U.S. Government publication, entitled Merchant Vessels of the United States, lists the gross tonnage of the tug SENECA to be 156, so that its limit of liability would be $15,600.00, whereas petitioner has spent $152,500.00.

In the event that petitioner chose not to remove the oil spill, which it could have done with impunity, and the Government did so, the latter could only recover up to the gross tonnage of the offending vessel, which under no circumstances could have been the barge HYGRADE No. 18.

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* Unless there is willful negligence or willful misconduct within the privity and knowledge of the owner.

POINT II

The *Vermont* case does not preclude petitioner's right to litigate the only issue in this case.

The Court of Claims is in clear conflict with the established law of collateral estoppel because of its decision that the issue as to the cause of the oil spill has already been litigated and decided in *the Vermont case*. Petitioner is proceeding under 33 USC §1161(i)(1) and alleges that the oil discharged from the barge HYGRADE No. 18 was caused solely by an act or omission of a third party without regard to whether such act or omission was or was not negligent. Thus, the issue in this case is simple. Was the oil spill caused solely by an act or omission of a third party without regard to whether such act or omission was or was not negligent?

The Court of Claims disposed of that issue by deciding that *the Vermont case* already decided that the oil spill was caused by the tug SENECA. The Court of Claims refers to the decision of *Sea-Land Services,* v. *Gaudet,* 414 US 573, 593, 39 L.Ed. 2d 9, 94 S Ct 806, which quotes freely from the decision of this Court in *Commissioner* v. *Sunnen,* 333 US 591, 597-598, 92 L. Ed. 898, 65 S Ct 715 concerning collateral estoppel. The latter case stated as follows at page 598:

> "Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other

> party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment or collateral estoppel."

The Court of Claims misconstrued the above-quoted case which, in fact, supports petitioner's position that it is free to litigate points that were not at issue in *the Vermont case*. In the latter case, the Government sought injunctive relief on the basis of the Rivers and Harbors Act of 1899, 33 USC 403, 407, and the federal common law of nuisance. The granting of such relief was designed to diminish or prevent the likelihood of any violation or continuing violation of the environmental integrity of Lake Champlain. 33 USC §407 does not concern itself with the cause of a discharge, imposing its penalty solely on a determination that the discharge occurred. Furthermore, the federal common law of nuisance was only concerned with whether or not the nuisance existed and did not concern itself with the source or cause of such nuisance. Since the issues presented in litigation involving 33 USC §1161(i)(1) relating to the cause of an oil spill are not the same issues involved in prosecuting a claim for injunctive relief based upon 33 USC §§403 and 407 and the federal common law of nuisance, the parties in the subject litigation are free to litigate points which were not at issue in *the Vermont case* even though such points might have been tendered and decided at that time. Cf. *Commissioner* v. *Sunnen,* supra.

Petitioner did not contest the cause of the oil spill in *the Vermont case* because it considered the sole issue to be whether or not the Government was entitled to injunctive relief under 33 USC §§403 and 407 or the federal common law of nuisance. Petitioner did not fight out the cause of the oil spill in *the Vermont case* so that petitioner is not now seeking to renew a duel which, in fact, never occurred. Cf. *Commission* v. *Sunnen,* supra.

The decision of the Court of Claims is in conflict with the decision in *Halpern* v. *Schwartz*, 426 F. 2d 102 (CA2 1970) on the doctrine of collateral estoppel. The *Halpern* case decided that even a fully litigated issue will not be binding in subsequent litigation if the issue was not necessary and essential to the rendering of the prior judgment. The Court said at page 105, as follows:

> "The reason for this rule is twofold. First, the decision on an issue not essential to the prior judgment may not have been afforded the careful deliberation and analysis normally applied to essential issues, since a different disposition of the inessential issue would not affect the judgment . . . Second, the decision on an inessential issue in the prior judgment was not subject to the important safeguard as to its correctness, to wit: a contested review on appeal. An appeal from the prior judgment by the losing litigant, asserting error in the determination of an issue not central to the judgment, probably would be deemed frivolous by the appellate court, which would affirm without considering the merits of the claim of alleged error. Moreover, the losing litigant, unless he foresaw a potential collateral effect, would have little motivation to take an appeal from an alleged error which had no effect on the judgment. Finally, even if the losing litigant were to take an appeal, the winning litigant might not diligently oppose the claim of error on the merits, since he could demur, in effect, and rely solely on the argument that the claimed error was not essential to the judgment."

The Court of Claims adopts the contrary but erroneous view that even though the finding is not absolutely necessary to support the judgment because of other findings, but the finding contributes to a cumulative effect, peti-

tioner nevertheless is collaterally estopped from relitigating the finding.

Petitioner is ready, willing and able to offer proof that the oil spill resulted from the act or omission of a third party. Petitioner should have its day in Court and this suit presents its first opportunity to do so.

CONCLUSION

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

Opinion of the United States Court of Claims

IN THE

UNITED STATES COURT OF CLAIMS

No. 439-73

(Decided, December 17, 1975)

TANKER HYGRADE NO. 18, INC. v. THE UNITED STATES; MOTOR TUG CRUSADER, INC.,* ET AL., THIRD-PARTY DEFENDANTS

Stephen J. Buckley, attorney of record, for plaintiff and for third-party defendant Tanker Hygrade No. 24, Inc. *McHugh, Heckman, Smith & Leonard,* of counsel.

Robert P. Whelan, attorney of record, for third-party defendants Clayton P. Kehoe Towing Company, Inc. and Martin J. Kehoe Towing Company, Inc. *Darby, Healey, Stonebridge & Whelan* and *Francis J. McCaffrey, Jr.,* of counsel.

Rosemary Denson, with whom was *Assistant Attorney General Rex E. Lee,* for defendant.

* Although appearing as a third-party defendant in this case, Motor Tug Crusader, Inc. did not participate with regard to the subject motion.

Opinion of the United States Court of Claims

Before DURFEE, *Senior Judge*, NICHOLS and KASHIWA, *Judges*.

ON DEFENDANT'S MOTION AND THIRD-PARTY KEHOES' CROSS MOTION FOR SUMMARY JUDGMENT

KASHIWA, Judge, delivered the opinion of the court:

This is a suit by plaintiff against the United States to recover clean-up costs resulting from an oil spill on one of the navigable waterways of the United States. We deny plaintiff's claim and grant defendant's motion for summary judgment for reasons hereinafter stated.

Jurisdiction of this court over this action is founded upon 33 U.S.C. § 1161(i)(1) (1970), entitled "Control of pollution by oil." [1]

Plaintiff is a corporation organized under the laws of the State of Delaware with offices at Brooklyn, New York. It is a wholly owned subsidiary of Ira S. Bushey & Sons,

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[1] 33 U.S.C. § 1161(i)(1) (1970) reads as follows:

"(i)(1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil is discharged in violation of subsection (b)(2) of this section acts to remove such oil in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing clauses."

Inc. (hereinafter Bushey). It was the owner of the tank barge HYGRADE No. 18, a non self-propelled vessel. On September 30, 1972, the barge HYGRADE No. 18, loaded with a cargo of No. 6 fuel oil, was enroute from Rensselaer, New York, to Ticonderoga, New York, pushed by the tug JOAN KEHOE, owned and operated by Clayton P. Kehoe Towing Company, Inc., a company independent and not connected with Bushey in any way. At about 11:45 p.m. on that day the side of the barge HYGRADE No. 18 came into contact with a rock formation at the bank of the New York State Barge Canal, as a result of which part of her cargo was discharged through a hole caused by that contact. Plaintiff alleges in its petition that, pursuant to the provisions of 33 U.S.C. § 1161 (1970), it promptly undertook to remove the discharged oil from the navigable waters of the United States of America and caused the same to be accomplished at a reasonable cost to plaintiff of $152,500. Plaintiff further alleges generally that the said discharge was caused solely by an act or omission of a third party or third parties. In its pre-trial submission, plaintiff has taken an alternative position that the tug JOAN KEHOE pushing barge HYGRADE No. 18 caused the spill or that the tug SENECA, owned by Motor Tug Crusader, Inc., a Bushey subsidiary, was the cause of the oil spill. Plaintiff prays in its petition that by reason of the foregoing and pursuant to the provisions of 33 U.S.C. §1161(i)(1) (1970) plaintiff is entitled to recover from the United States the sum of $152,500.

Plaintiff sued the United States as a sole-party defendant. The United States filed an answer denying liability and filed a timely third-party petition against the following third-party defendants:

1) Motor Tug Crusader, Inc.

2) Clayton P. Kehoe Towing Company, Inc.

3) Martin J. Kehoe Towing Company, Inc.

4) Tanker Hygrade No. 24, Inc.

The United States claims in the third-party petition:

> That if any judgment be entered against the United States of America in favor of plaintiff Tanker Hygrade No. 18, Inc., herein, that a judgment be awarded in favor of the United States of America and against third-party defendant Motor Tug Crusader, Inc., third-party defendant Clayton P. Kehoe Towing Company, Inc., third-party defendant Martin J. Kehoe Towing Company, Inc., and third-party defendant Tanker Hygrade No. 24, Inc., requiring each of said third-party defendants, jointly and severally, to pay to the United States of America the amount of any such judgment and to indemnify and exonerate the United States of America against any and all liability herein; * * *. (At pp. 4-5.)

All of said third-party defendants were duly served and each of them answered the third-party petition of the United States, denying any liability. In addition to answers, the two Kehoe companies have filed a joint motion for summary judgment. We shall refer to this joint motion at the end of this opinion.

The United States in the meantime filed a motion for summary judgment against plaintiff, Tanker Hygrade No. 18, Inc. We quote from a memorandum attached to said motion (at pp. 2-4), stating the grounds for said motion:

Plaintiff, Tanker Hygrade No. 18, Inc. (hereinafter Hygrade 18) has filed its action under 33 U.S.C. 1161(i) of the Federal Water Quality Improvement Act of 1970 (Pet. Paragraph 1).

Title 33 U.S.C. 1161(i) provides in part:

> "In any case where an owner or operator of a vessel * * * from which oil is discharged in violation of subsection (b)(2) of this section acts to remove such oil * * * such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing * * * that such discharge was caused *solely by an act or omission of a third party* * * *." (emphasis added)

In its pretrial submission Hygrade 18 contends that the tug JOAN KEHOE was the cause of the oil spill (Pretrial Submission 1(c)(1)). Title 33 U.S.C. 1161(i) requires that plaintiff prove that the discharge was *caused solely* by an act or omission of a *third party.*

The cause of the September 30, 1972 incident has already been decided in *United States* v. *Ira S. Bushey & Sons, Inc.,* 363 F. Supp. 110, 115 (D. Vt. 1973), aff'd 487 F. 2d 1393 (2d Cir. 1973), cert. denied 417 U.S. 976 (1974), and the findings in that case clearly preclude any recovery by plaintiff under 33 U.S.C. 1161(i).

Bushey found that the barge BLUE LINE 107, push towed by the tug SENECA, caused the oil spill from HYGRADE 18 on September 30, 1972, in the Lake Champlain Canal. *Bushey,* pp. 115-116. However, HYGRADE 18 now comes to the Court of Claims attempting to relitigate these findings and

asserts that the spill was caused solely by the JOAN KEHOE. Query why HYGRADE 18 does not assert that the SENECA or BLUE LINE 107 caused the spill and support its claim with the findings in *Bushey*, p. 115-116, 119.

The answer is glaringly revealed in *Bushey* where the court found that the public interest to preserve the environmental integrity of Lake Champlain—threatened by numerous Bushey oil spills—dictated that the corporate veil of Bushey should be pierced. Bushey, p. 119. The court found that the corporations owning HYGRADE 18, the SENECA and BLUE LINE 107 are wholly-owned subsidiaries of the same parent company, Ira S. Bushey & Sons, Inc., and that those three vessel-owning corporations were "mere corporate shells established for purposes of avoiding tort liability to the parent for the acts of the subsidiaries which are the alter egos of Bushey." *Bushey* p. 119.

Under 33 U.S.C. 1161(i), HYGRADE 18 would have to prove that the spill was caused solely by an act or omission of a third party in order to be reimbursed for the money spent for cleaning up the oil spill. Since the SENECA and BLUE LINE 107 are not third parties in relation to HYGRADE 18 because of their "alter ego" relationship to Bushey, this action must fail.

On collateral estoppel we quote from *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593 (1974), a recent case:

Collateral estoppel applies "where the second action between the same parties is upon a different cause or demand * * *. In this situation, the judg-

> ment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell* v. *County of Sac,* [94 U.S. 351,] 353. And see *Russell* v. *Place,* 94 U.S. 606; *Southern Pacific R. Co.* v. *United States,* 168 U.S. 1, 48; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U.S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. *But matters which were actually litigated and determined in the first proceeding cannot later be relitigated." Commissioner* v. *Sunnen,* 333 U.S., at 597-598. [Emphasis supplied.]

We shall first quote the district court's finding number 28 from *United States* v. *Ira S. Bushey & Sons, Inc.,* 363 F. Supp. 110, 115-116 (D. Vt. 1973), affirmed in toto without opinion in 487 F. 2d 1393 (2d Cir. 1973), *cert. denied,* 417 U.S. 976 (1974):

> 28. On September 30, 1972, while under way between Locks 9 and 11 of Lake Champlain Canal, barge Hygrade No. 18, owned by the Tanker Hygrade No. 18, Inc., a wholly-owned Bushey subsidiary, was struck by the tank barge Blue Line No. 107 being pushed by the tug Seneca, both owned by corporations which are wholly-owned by Bushey subsidiaries. The resulting collision caused the Hygrade No. 18 to strike rocks on the bottom of the

canal which caused No. 6 fuel oil to leak from Hygrade No. 18 into the canal. The canal flows north into Vermont waters of Lake Champlain, but there is no evidence that the oil spilled in the canal did so flow. But Hygrade No. 18 proceeded into Lake Champlain and toward Ticonderoga after the ramming and oil was seen to bubble out of it into the lake.

(A) Before the collision, the captain of the tug Kehoe, which was pushing tank barge Hygrade No. 18, was in radio communication with the captain of the tug Seneca, which was pushing the tank barge Blue Line No. 107. The captain of the tug Seneca agreed to hold back at Bray Terminal, which was an area wide enough for the vessels to pass. After agreeing to do this, the captain of the tug Seneca disregarded the agreement, and proceeded about three-quarters of a mile southerly. As the tug and barge approached each other, the captain of the Kehoe brought his tug and barge to a halt and he attempted by radio to warn the Seneca and Blue Line No. 107 not to pass. The captain of the Seneca did not answer the radio warning, and the barge Blue Line No. 107 hit the Hygrade No. 18 while attempting to pass, resulting in the damage to the Hygrade No. 18 and a subsequent oil spill.

(B) The Hygrade No. 18 spilled between 200 and 1,145 gallons of No. 6 oil along some six miles of the canal and also in the Vermont waters of Lake Champlain.

(C) The spill from Hygrade No. 18 was such as to cause defendant Bushey to expend the sum of

> $150,000 in cleaning the Champlain Canal of No. 6 oil.

There is no question that the oil spill referred to in finding number 28 is the identical spill the clean-up expenses of which are the subject matter of this action in this court. Hereafter, we shall refer to this finding as finding 28.

We further quote the following finding of the district court at page 119 of its opinion:

> As previously held, this court has jurisdiction of the parties and venue in the District of Vermont is proper. *Public policy dictates that the veil of Busney's and Spentonbush's separate corporate entities be pierced, since these corporations wholly own, control, manage, operate and in all ways supervise the operations of the many subsidiaries of Bushey. See* United States v. Ira S. Bushey & Sons, Inc., No. 6380 (D. Vt., Oct. 11, 1975) (unpublished opinion on motions to sever and transfer). *The subsidiaries are mere corporate shells established for purposes of avoiding tort liability to the parent for the acts of the subsidiaries which are the alter egos of Bushey and Spentonbush.* Cf. United States v. Parfait Powder Puff Co., 163 F. 2d 1008, 1010 (7th Cir. 1947), cert. denied, 332 U.S. 851, 68 S. Ct. 356, 92 L. Ed. 421 (1948). Injunctive relief against only one or a few of the subsidiaries could easily be circumvented by the parent, with the assistance of the similarly wholly owned Spentonbush, simply by using other subsidiary corporations to make petroleum deliveries to Vermont. The public interest in preserving the environmental integrity of Lake Champlain, the sixth largest lake in the country and a jewel of nature, is sufficiently

> paramount that the parent corporation, Bushey, which profits from the operations of its alter-ego subsidiaries, should be accountable for any violation or continuing threat of violations to that integrity. (Emphasis supplied.)

This finding is not numbered in that it is in the opinion portion of the decision. We shall hereafter refer to the foregoing finding as the piercing-corporate-veil finding. The district court based it on additional findings numbered 1 to 9.[2]

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[2] The district court's findings numbered 1 to 9 are as follows:

"1. Defendant Ira S. Bushey & Sons, Inc. (hereinafter "Bushey"), is a New York corporation having offices at 764 Court Street, Brooklyn, New York.

"2. Spentonbush Transport Service, Inc. (hereinafter "Spentonbush"), is a wholly-owned subsidiary of Bushey and a New York corporation having offices at 500 Fifth Avenue, New York, New York.

"3. The directors of Bushey and the directors of Spentonbush are the same persons, Francis B. Bushey, Ira S. Bushey and Raymond J. Bushey. The officers of Bushey and Spentonbush are substantially the same.

"4. Defendant Bushey wholly owns approximately 40 corporations, each of which owns vessels used in the transportation of liquid cargoes; of these approximately 25 tugs and barges are capable of operating in the Vermont waters of Lake Champlain, a navigable water of the United States, and most of these vessels do in fact operate in Vermont waters. Among such vessels are Tanker Hygrade No. 8, owned by defendant Tanker Hygrade No. 8, Inc., and the tug Carmelite owned by defendant Tug Carmelite Corporation.

"5. Spentonbush is and has been for a number of years engaged in the business of the solicitation of orders for transportation of liquid cargoes by water, and of arranging for performance of such

(Footnote continued on following page)

Defendant's position is that since under § 1161(i)(1) plaintiff cannot recover unless it proves that the discharge was caused *solely by an act or omission of a third party,* this case should be summarily decided in defendant's favor because collateral estoppel prevents plaintiff from relitigating both finding 28 and the piercing-corporate-veil finding.

Plaintiff in response to defendant's motion for summary judgment argues that finding 28 was not necessary and essential to the resulting judgment of the district court which granted injunctive relief. It states that findings of the district court, taken as a whole, led to the district court's decision to issue an injunction but a finding with respect to each incident by itself was not necessary and essential to the district court's decision to grant in-

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(Footnote continued from preceding page)

transportation by vessels, and it gives preference to vessels of Bushey subsidiaries in arranging water transportation contracts.

"6. Spentonbush collects transportation charges for such water transportation, deducts a commission and remits the balance to the owners of the particular tank barge and tug boat involved.

"7. Since December, 1970, crews used by vessels owned by Bushey subsidiaries have been hired and employed either by Spentonbush or by Hygrade Operators, Inc., a wholly-owned subsidiary of Bushey.

"8. None of the wholly-owned, vessel-owning, corporate subsidiaries of Bushey operating in Lake Champlain employs its own crew, its own accounting personnel, or any other employees except for its officers. The officers and directors of each subsidiary corporation, except Spentonbush, are identical to the officers and directors of defendant Bushey.

"9. The net profit or surplus from the operations of Spentonbush and other wholly-owned Bushey subsidiaries are remitted to Bushey by way of corporate dividends." [At pp. 111-112.]

junctive relief. Plaintiff cites and relies on *Halpern* v. *Schwartz*, 426 F. 2d 102 (2d Cir. 1970), wherein the court in a petition for discharge in bankruptcy, proceeding with relation to a prior judgment adjudicating petitioner bankrupt, stated:

> This case presents a unique issue in the law of collateral estoppel which has not been analyzed exhaustively by any court. When the prior judgment rested on several (here three) independent, *alternative grounds*, is that judgment conclusive as to the facts which were necessarily found in order to establish only one separate ground? We conclude that on the facts before us it is not.
>
> It is well established that although an issue was fully litigated and a finding on the issue was made in the prior litigation, the prior judgment will not foreclose reconsideration of the same issue *if that issue was not necessary to the rendering of the prior judgment, and hence was incidental, collateral, or immaterial to that judgment.* Norton v. Larney, 266 U.S. 511, 517, 45 S. Ct. 145, 69 L. Ed. 413 (1925); Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, 344 F. 2d 300, 306 (9 Cir. 1965); United States v. Rodiek, 117 F. 2d 588, 593 (2d Cir. 1941), aff'd, 315 U.S. 783, 62 S. Ct. 793, 86 L. Ed. 1190 (1942); Restatement of the Law of Judgments § 68, Comment o (1942); 1B Moore, Federal Practice ¶ 0.443[5] at 3919 (1965). The reason for this rule is twofold. First, the decision on an issue not essential to the prior judgment may not have been afforded the careful deliberation and analysis normally applied to essential issues, since a different disposition of

> the inessential issue would not affect the judgment. Irving Nat'l Bank v. Law, 10 F. 2d 721, 724 (2d Cir. 1926) (L. Hand, J.). * * * [At pp. 104-105, emphasis supplied.]
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>
> We therefore hold that when a prior judgment adjudicating one a bankrupt rests on two or *more independent alternative grounds,* it is not conclusive as to issues in trial of objections to discharge which issues were necessarily found in order to establish only one of those grounds. In so holding, we think distinguishable the only other case we have found in this circuit which ruled on a somewhat similar issue, Kessler v. Armstrong Cork Co., 158 F. 744 (2d Cir. 1907), cert. denied sub nom. Sexton v. Armstrong Cork Co., 207 U.S. 597, 28 S. Ct. 262, 52 L. Ed. 357 (1908). To the extent that Patterson v. Saunders, 194 Va. 607, 74 S.E. 2d 204 (1953), Sheldon v. Edwards, 35 N.Y. (8 Tiffany) 279 (1866), Annot., 133 A.L.R. 840, 846 (1941) are to the contrary, we decline to follow them. [At pp. 106-107, footnotes omitted, emphasis supplied.]

In *Stebbins* v. *Keystone Insurance Co.,* 481 F. 2d 501, 507-508 (D.C. Cir. 1973), the court of appeals, with relation to *Halpern* v. *Schwartz, supra,* after stating that it was the only case in the past 20 years to consider the question, stated as follows:

> Collateral estoppel has shown itself to be an extremely useful device for reducing the crush of litigation in the trial courts, and it goes a long way toward eliminating inconsistent decisions in cases

> with identical fact patterns and a common party. In part for these reasons, the recent trend has been to broaden the scope of its application. *Halpern,* of course, runs against this current. The *Halpern* rule was evolved in the context of a bankruptcy case. We need not decide whether the *Halpern* approach is sound if applied as a general rule to a wide range of matters. * * * [Footnote omitted.]

But the court of appeals permitted the *Halpern* rule to apply only to very narrow facts of the case with relation to a matter which was curable anyway.

As in *Stebbins* v. *Keystone Insurance Co., supra,* we need not decide whether the *Halpern* approach is sound because the rule in *Halpern* is not applicable under the facts of this case. *Halpern* limits its application to a prior judgment resting on two or more independent, *alternative* grounds. In *Halpern* the three grounds were clearly in the alternative but in the present case the nine Bushey-connected oil spills between August, 1967, and November, 1972, were not for alternative consideration, instead they were offered and received by the district court for the cumulative effect. The district court found that the cumulative effect justified the issuance of the injunction. Findings 48, 61, 62, and 63 of the district court clearly support our cumulative-effect view:

> 48. During the past five years, the nine oil spills in Vermont waters of Lake Champlain, involving Bushey controlled vessels, have either damaged, or presented a substantial risk of damage, to Vermont beaches, a major municipal water supply, and to waterfowl and fish, particularly in the Burlington-Shelburne harbor areas.
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61. Due to the numerous oil spills involving defendants Bushey and Spentonbush, and due to the violations of the Refuse Act by Bushey and Spentonbush, as appears from the records in the United States District Court for the District of Vermont, the court finds that the Government is entitled to equitable relief against defendants Bushey and Spentonbush.

62. The court finds that the numerous oil spills that have occurred together with the continuation of slack operations by defendants as above described poses a continuing nuisance threatening the general public, wildlife, lakefront property owners and the environment of Lake Champlain and its shore lines.

63. The court finds that the numerous past oil spills that have occurred, the continuation of slack operations by defendants and the damaging effects of oil spills cause a continuing threat of irreparable harm to the navigable waters of the United States and hence to the plaintiff. [*Bushey, supra,* at 117, 119.]

With relation to the oil spill involved in this case, described in finding 28, the oil which spilled was No. 6 fuel oil. The court in finding 19 described the difference in effect on water between more volatile oils such as jet fuel as compared to heavy heating oil as follows:

19. The effect of an oil spill on water varies with the kind of spill—jet fuel evaporates quickly while heavy heating oil does not—and environmental conditions; with certain kinds of oil under certain conditions, as those of turbulence, shear forces at the oil-water interface may prevail causing an influx

> of oil into the water column rather than mere confinement of it to the surface where it may be more easily contained. [*Bushey, supra,* at p. 113.]

Of the nine oil spills listed, six were of the quickly evaporating type, such as gasoline, kerosene, or jet fuel; the remaining three spills covered by findings 25, 26, and 28 were of the heavy heating oil type. Of all nine spills it appears from the findings in finding 25 that the spill of the heavy heating oil in finding 25 was the most damaging. The oil spill in finding 28, the spill in issue herein, was of the heavy oil type, as in finding 25, causing with the other spills and the slack operations by the Bushey organizations a continuing threat of irreparable harm to the navigable waters of the United States. Plaintiff is estopped to relitigate the cumulative effect of findings in findings 48, 61, 62, and 63.

The inexcusable operation of the tug SENECA, whereby two of the Bushey barges collided as found in finding 28, was the very type of "slack operation" the district court was referring to in findings 62 and 63 above quoted. In finding 27 the slack operation involved the officer in charge being under the influence of alcohol. These slack operations in findings 27 and 28 cumulatively with the other seven described operations caused a continuing threat of irreparable harm to the navigable waters involved. Plaintiff is estopped from relitigating the cumulative effect found by these slack operations in findings 48, 61, 62 and 63.

With relation to cumulative findings in *Hawes* v. *Contra Costa Water Co.,* 11 F. Cas. 862 (No. 6,235) (C.C. S.D. Cal. 1878), *aff'd,* 104 U.S. 450 (1882), which involved the effect of a decree of a State court as an authoritative

construction of a state statute, binding upon a Federal court, the court stated:

> * * * Both grounds were distinctly and squarely presented by the record, and relied on, and the latter more especially fully argued by counsel. The court might just as well have rested its decision on the second ground, if found good, without noticing the first, as upon the first without noticing the second. Or it might, if thought proper, have decided both, as it did. It is a matter of almost everyday occurrence that the record presents two or more points, either of which, if sustained, would determine the case, and the court decides them all. In such case it can no more be said that one rather than the other is obiter. * * * [At p. 865.]

See, also, *First Nat'l Bank* v. *Covington,* 129 F. 792 (C.C. E.D. Ky. 1903), *aff'd,* 198 U.S. 100 (1905), wherein the court stated:

> * * * The fact that the judgment of a court in a suit might have been based upon another ground than that on which it was actually based does not prevent the determination that such ground existed being conclusive as to its existence in a subsequent suit between the same parties, if its existence was in issue in the former suit, and properly formed the basis of the judgment therein. * * * [At p. 796.]

The cumulative effect view rule is well put in Freeman, Judgments § 698 (5th ed.), wherein it is stated:

> * * * there is a difference between a finding or adjudication which is immaterial and one which is material, though perhaps unnecessary in view of other

findings. The mere fact that the court goes further than is absolutely necessary to sustain its judgment in determining material issues presented to it does not prevent such issues from becoming res judicata.

We hold as follows:

1) Defendant's motion for summary judgment is granted and plaintiff's petition (hereafter petition-in-chief), including plaintiff's alternative positions in its pre-trial submissions, is dismissed;

2) The contingent claims of the United States against the two third-party defendants Motor Tug Crusader, Inc. and Tanker Hygrade No. 24, Inc. are also dismissed because of the dismissal of the petition-in-chief in (1) above;

3) With relation to the joint cross motion for summary judgment by the two third-party defendants Clayton P. Kehoe Towing Company, Inc. and Martin J. Kehoe Towing Company, Inc.:

a. that portion requesting summary judgment dismissing the petition-in-chief is allowed by reason of the dismissal of the petition-in-chief in (1) above and

b. that portion requesting dismissal of the impleading petition is allowed by reason of the dismissal of the petition-in-chief in (1) above.

Statutory Provisions Involved

Text of 33 USC 1161(f)(1)

LIABILITY OF OWNER OR OPERATOR OF VESSEL, ONSHORE FACILITY, OR OFFSHORE FACILITY FOR DISCHARGE OF OIL; EXCEPTIONS; AMOUNT OF LIABILITY; PROCEDURE FOR RECOVERY

(f) (1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil is discharged in violation of subsection (b) (2) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil by the United States Government in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

Statutory Provisions Involved

Text of 33 USC 1161(g)

PROOF BY OWNER OR OPERATOR OF VESSEL, ONSHORE FACILITY, OR OFFSHORE FACILITY OF LIABILITY OF THIRD PARTY FOR DISCHARGE OF OIL; EXCEPTIONS TO THIRD PARTY LIABILITY; AMOUNT OF LIABILITY; PROCEDURE FOR RECOVERY

(g) In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil is discharged in violation of subsection (b) (2) of this section proves that such discharge of oil was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil in violation of subsection (b) (2) of this section, the liability of such third party under this subsection shall not exceed $100 per gross ton of such vessel or $14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred, if such owner or operator were liable. If the United States can show that the discharge of oil

in violation of subsection (b) (2) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

Text of 33 USC 1161(i)(1)

REMOVAL BY OWNER OR OPERATOR OF VESSEL, ONSHORE FACILITY, OR OFFSHORE FACILITY OF DISCHARGED OIL; SUIT AGAINST UNITED STATES FOR RECOVERY OF REASONABLE COST OF REMOVAL; APPLICABILITY TO OUTER CONTINENTAL SHELF LANDS ACT; PAYMENT OF JUDGMENT

(i) (1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil is discharged in violation of subsection (b) (2) of this section acts to remove such oil in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing clauses.